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In the Supreme Court of the State of Utah

HILDA A. BRIMM,
Plaintiff and Respondent.

vs.

CACHE VALLEY BANKING CO.
a corporation, ADMINISTRATOR
OF THE ESTATE OF ANDREW
ANDERSEN, AKA, ANDREW
ANDERSON, Deceased.

Defendant and Appellant.

Case No. 7979
RESPONDENT'S
BRIEF

Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache

Hon. Lewis Jones, Judge

George C. Heinrich
Attorney for Plaintiff
and Respondent.

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RESPONDENT'S
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Respondent agrees with appellant that this is a quiet title action. The facts are not in dispute, or at least there is very little dispute as to what the facts are, but there is considerable dispute between these parties as to the interpretation and meaning to be applied to them, legally. And, except for a few omissions, appellant's Statement of Facts, are fairly accurate. Respondent will supply such omissions during the course of her argument rather than to make an additional or supplemental statement of facts, believing this will be in the interest of clarity as well as to shorten this brief. While appellant did object to the introduction of some of the evidence—the use to which the waters emanate

ing from the springs have always been put to—it is believed that there is not and could not be any dispute as to these facts themselves. Respondent will answer appellant's argument, point by point in the order in which presented.

ARGUMENT

Point No. 1: The lower court plainly did not err in finding and holding that the 112 shares of stock in the Mendon Central Irrigation Co., a corporation, is appurtenant to the lands described in the complaint.

Appellant argues at pages 8 to 10 of its brief that because the early water users formed a corporation in 1917-1918, the Mendon Central Irrigation Co., and in exchange for the conveyance by them of their respective rights to the use of the waters emanating from certain springs they each received a certain number of shares of stock issued by the newly formed corporation which entitled each of them to a like amount of water (the same as they each formerly had), that therefore, ipso facto, the certificates of stock and the water represented thereby became personal property, the water was severed from the land, that the water represented thereby could not be, remain or become appurtenant to any lands unless the certificate of stock itself was specifically transferred, and then cites and relies upon *George vs. Robison, et al*, 63 Pac. 819 (Utah) (1901) and also refers and quotes from Sec. 73-1-1 UCA, 1953 in support. Appellant then concludes that the Deed of Water Rights, Defs. Ex. 1, severed the water from the land, and then

asks "what proof has plaintiff produced to show that she is the owner of this water right?" and then answering the question thus asked asserts, "Absolutely none." This therefore involves a question of both facts and applicable law. First as to the fact, "what proof has plaintiff produced to show that she is the owner of this water right?"

Here is the proof! On March 18, 1895, Andrew Andersen and his wife, Sofia Anderson, conveyed the 17.63 acre tract to James Quayle and Joseph E. Cowley, and Andrew Andersen never thereafter acquired title to this tract for on May 28, 1896, Quayle and Cowley conveyed to said Sophia Andersen. Certainly under all law this conveyance carried with it the water right and if so, then it must follow that a re-conveyance gave the water right to Sophia Andersen. This same tract was also conveyed to her a little over a month previous, on April 7, 1896, by the Mayor of Mendon City with appurtenances. (Abst. 8-10). The Articles of Incorporation of Mendon Irrigation Co. are dated Feb. 9, 1918, bears the signature of Andrew Andersen (not that of Sophia Andersen, the wife, who at that time undoubtedly under all law was the owner of the water as a part of the real estate) as one of the incorporators. Article 6 provides: "That the purpose for which this corporation is formed, and the pursuit and business agreed upon, is to engage exclusively in furnishing water to and for *lands owned* by the stockholders thereof, etc."

Defs. Ex. 2). Defs. Ex. 1, Deed of Water Rights, was signed March 9, 1918, and was joined in by Sophia Andersen, wife of one of the "incorporators," her husband Andrew Andersen. Querry, if any stock thus issued to an "incorporator" who was not then the owner of any lands to be irrigated from the waters emanating from the spring waters became anything more than the holder of a certificate of stock as a trustee for the land owner? But be this as it may, at this time *and always since* the lands were irrigated without interruption from the waters which emanated from the springs referred to in the exhibits and in appellant's brief, page 5. On July 23, 1918, Andrew Andersen conveyed the 2.50 acre tract to his wife, Sophia Andersen. (Abs. 19).

Andrew Andersen died July 19, 1922, at Mendon. On January 25, 1924, Sophia L. Andersen, his widow, conveyed the said tracts to L. M. Andersen, her son, who was a bachelor. (Abst. 15) L. M. Andersen died November 18, 1947, and on May 24, 1948, Decree of Final Distribution was entered in his estate by the terms of which, in addition to other property, an undivided $6\frac{7}{72}$ interest in the said two tracts of land was distributed to Catherine S. Gibbons. (Abst. 20-25). And on July 7 and July 26, 1948, by separate deeds Raymond Andersen, et. al., and Mrs. Farrell Thomas conveyed their interests in said tracts to Catherine S. Gibbons (Abst. 26-27). By this time she had acquired

an 8/9ths interest in the property. On January 25, 1949, Catherine S. Gibbons, conveyed her undivided 8/9ths interest in said tracts to Hilda A. Brimm, formerly Hilda A. Leonard, a niece by relation and a sister by adoption to Catherine S. Gibbons and L. M. Andersen, deceased. On June 22, 1949, this plaintiff, Hilda A. Brimm, acquired the remaining outstanding 1/9th interest in said tracts of land for a consideration of \$2,000.00 from her uncle by relation and brother by adoption, John C. Andersen, who is one of the petitioners herein for letters of administration on the estate of Andrew Andersen, deceased, his deceased father. (Abst. 29) Hilda A. Leonard had previously conveyed her interest as an heir of L. M. Andersen to Catherine S. Gibbons. (Abst. 20) By Decree of District Court of Cache County dated Sept. 11, 1950, affirmed by this court in 230 Pac. 2nd 983, Hilda A. Brimm, plaintiff herein, was adjudged to be the owner of said two tracts of land (and other land) burdened to support Catherine S. Gibbons, a daughter of Andrew Andersen, deceased, The heirs of L. M. Andersen and Andrew Andersen are the same. (Tr. 41) Both tracts of land have always been watered from water out of Mendon Central Irrigation Company canals and ditches. (Tr. 28-23) Land is worth little without water. (Tr. 34-36). Water covered by certificate of stock and that used to irrigate is the same water. (Tr. 36) All assessments which called for labor have been paid or worked out (Tr. 45-47-49) Never any interference with the right to use water until last

summer. (1951) (Tr. 49-50) It will be observed also that many of the conveyances referred to include appurtenant water rights belonging to the land conveyed (abst. 22,26,27,28) and that the persons making these conveyances are also heirs of Andrew Andersen, Deceased. It would seem from this, reasonably, that everybody considered the water as appurtenant to the lands upon which the water has always been used. There is certainly no evidence anywhere in the record of a contrary intention.

Having thus answered appellant's question as to "what proof plaintiff produced to show that she is the owner of the water right", it may now be appropriate to ask what proof has appellant, except the stub of the stock ledger which simply shows delivery of the certificate of stock to Andrew Andersen if this constitutes any probative value at all at this late date, on April 30, 1918 to the right to the use of the water in question, and also, further, upon what equitable principles can appellant claim ownership? Appellant does not even have possession of the certificate itself. Nor offer any explanation as to where it is, except that they do not know. For ought they know Andrew Andersen may have endorsed and delivered it in his lifetime to his wife, and such an assumption is much more in keeping with reason than it would be to conclude that he intended his wife to have the ownership of the lands but without the water and without

which they are of little use and value. An assumption of endorsement and delivery, it seems to the writer, is much more in keeping with reasonableness on the part of Andrew Andersen, deceased, than it would be to presume, as appellant does on page 11 of brief, that no water right was mentioned in the conveyance from Sophia Andersen to her son, L. M. Andersen, because they no doubt knew the water right could not be transferred by deed, and that the ownership of water was then vested in the estate of Andrew Andersen, deceased. Certainly if this was the case a probate would not have been delayed for a period of thirty years. It is submitted everybody always considered the water part of the land, some of them adverting to putting such references in the conveyances and some simply overlooking the fact, which made no difference legally so far as the water being appurtenant is concerned. So much then for what might be inferred from the fact that plaintiff does not have possession of the certificate, and for the fact that appellant who claims to be the owner thereof knows nothing about what deceased did with it—if this sort of inference legally has anything to do with right to use of water—under the facts and circumstances in the case at bar. If it does, then the fact remain that appellant who claims to be the owner of the water does not have the certificate nor explain where it is, nor do they show that they ever used the water or even ever paid an assessment. All appellant says is that we want the water.

And at pages 10-12 of brief appellant says the deed given (Defs. Ex. 1) completely severed the water from the land, that the water could then be used in whole or in part upon other lands, and that the certificate and water represented thereby became and forever remained personal property, unless the certificate is delivered to the owner of the land. Of course, the water could be used upon any lands served by the canal company's ditches, etc. There is no quarrel with this statement. But the fact remains that this water never was used upon any lands other than the two tracts of land. This is not even disputed. And at page 12 of brief appellant quotes rather copiously from *George vs. Robinson*, 63 Pac. 819. (Utah) (1901). The question in this case was simply whether or not there was a breach of warranty because there was no water with the land. A cursory reading of the record in the case at bar discloses a vast difference with respect to the use of water, payment of assessments, etc., with the facts in the *Robinson* case, *supra*. Then too in the *Robinson* case at page 819, right hand column, it says, "Were, then, the water rights in fact appurtenant to the land? If they were, the absence of any mention of them in the deed is immaterial; but, if not, the warranty does not include them. To determine the question thus presented reference must be had to the evidence *dehors* the instrument of record".

The facts above produced shows without contradic-

tion that the water has always been appurtenant. Under our decisions water is "appurtenant" if water is used in direct connection with the real estate conveyed. *Thompson vs. McKinney* 63 Pac. 2d. 1056. Enough has then been here said to show that the facts in the case at bar and the *Robinson* case are not even analogous. But even so, the *George vs. Robinson* case, *supra*, has been overruled by this court in, *In re Johnson's Estate*, 228 Pac. 748, (Utah) (1924), where, at page 751, bottom of right hand column referring to the *Robinson* case this court had the following to say:

"It is true that the decision is based largely upon the argument that the shares of stock representing the water rights in question were personal property and therefore not capable of being appurtenant to real estate. This is the general rule with respect to shares of stock in ordinary corporations, organized for pecuniary gain. But we think the rule is not absolute, and should not apply to shares of stock in an irrigation company which is not organized for profit but for the convenience of owners of water rights in the regulation and distribution of the water to which they are entitled. This distinction was not considered in the opinion of the court and there were other controlling factors in the case, for which reason the general rule there expressed should be modified, when applied to a case like the one at bar."

It is plain, therefore, whether or not water represented by certificates of stock is appurtenant to lands is a rebuttable presumption, and not a conclusive one

as appellant contends, and that the proof in the case at bar conclusively rebuts any contrary presumption which might be indulged springing from a mere delivery of a stock certificate to Andrew Andersen, now deceased, more than thirty-three years prior to the date of trial. But appellant will probably argue that in re Johnson's Estate, supra, is a will case and so not in point. But a reading of the case will clearly show that this can make no difference so far as the holding here relied upon is concerned. Also, other cases decided by our court have dealt and shows clearly the trend and holding of our court on the question here presented. In Cortella vs. Salt Lake City, 72 Pac. 2d. 630, (Utah) (1937) at page 635, note 5, after citing cases where the fact of appurtenancy was also questioned, the court said:

“The defendant argues that the water in the canal is personal property and so could not become appurtenant to the lands on which it was used and cites, etc. . We do not deem it necessary to determine whether the corpus of the water in the city's canal is personalty or realty. We are not here dealing with water as personal property but with the right to the use of water created and bestowed by the exchange agreement for the benefit of certain lands. This involves a right to the flow of water in and from the city's canal to be used upon said lands. Such a right is treated as an incorporeal hereditament as distinguished from the corpus of the water, and is real property.”

Appellant next quotes extensively from Oppenlander

vs. Left-Hand Ditch Co., 31 Pac. 854 (Colo.) and states that the decision of this court in George vs. Robinson, supra, is supported by that case. George vs. Robinson was decided by our court in 1901 and the Oppenlander case was decided in 1892, nine years earlier, and the Robinson case does not even mention it. The Oppenlander case is unimportant for at least two reasons: First, the facts are entirely different. There the stock was sold, but even so the question of the water being appurtenant, if it could have been shown, was left open. Therefore, upon examination, the case contains no points of analogy, but many points of difference from the facts in the case at bar; and second, our court has decided in the question contrary in *In re Johnson's Estate*, supra.

Now as to appellant's other claim, the water was severed from the land? Certainly to say it was severed, does not make it severed. There is no evidence in the record of severance so far as usage of the water is concerned because it is undisputed that for more than fifty years (Abst. 2) the water has without interruption been used upon the lands in question. As stated the Articles of Incorporation were signed February 6, 1918. The purpose and business agreed upon was as stated in Article 6, "is to engage exclusively in furnishing water to and for lands owned by the stockholders thereof". Andrew Andersen was not even then a landowner. Article 5 provides for the issuance of a

limit of 1350 shares of stock of different classes and kinds which were to be issued in exchange of certain spring water rights. Article 7-A again provides that the rights and privileges are based upon the respective prior rights of the stockholders in and to the use of the waters arising from the mentioned springs. Article 7-B provides that the assessments shall be limited to repairs and maintenance of ditches necessary for the distribution of waters to the holders of stock. Article 8 provides that dividends shall only consist of the distribution of such water to each of the stockholders as he is entitled to, and not otherwise. By Article 19 each signer of the Articles represented that he is the owner of a vested primary right to the use of the waters offered in exchange for stock to be issued to him. It is submitted that Andrew Andersen was not at this time the owner of any primary right because he did not have title to the land to which the water was then undeniably appurtenant and a part of. It was realty and the water has never been severed therefrom by any act or deed of Sophia Andersen. The Articles clearly show that the Mendon Central Irrigation Co. is nothing more nor less than a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, and that ownership of shares of stock in the corporation is but incidental to ownership of the water right.

Appellant at page 14 of brief, states, "If there could be any doubt whether a water right represented by shares of stock in a corporation, is appurtenant to the land upon which it is used, such doubt was removed by the Legislature when it amended Section 100-1-10, U. C. A .,1943, Session Laws 1943, page 154, which is now 73-1-10, U. C. A. 1953, and then quotes:

"Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, *in which case water shall not be deemed to be appurtenant to the land.*"

It is believed that counsel for appellant construes the above words which I have underlined to be a conclusive presumption and that in this he is in error. As previously pointed out, respondent takes the position that the language underlined constitutes a rebuttable presumption at most and that this has been abundantly met by the evidence produced. Also, it is in keeping with the decisions in *George vs. Robinson*, supra, that evidence of appurtenancy may be proven by proof dehors the instrument, and the decision in *In re Johnson's Estate*, supra. And following said Section 73-1-10 is also cited the case of *East River Bottom Water Co. vs. Boyce*, 128, Pac. 2d 277, decided by this court July 23, 1942, wherein it is stated:

"Where Articles of agreement of water company set forth object of company to be the controlling, managing, and distribution of certain water of a certain river, it was held that such

limited and restrictive words did not constitute a conveyance separating a water right appurtenant to land from the land, and did not vest the title or right of use in the corporation within the provisions of this section”.

It is respondent's position that the purposes as contained in the Articles of Incorporation of Mendon Central Irrigation Co. comes within the holding of this case and that because thereof the “Deed of Water Rights” did not, therefore, ipso facto, constitute a severance. 56 A. J. Waters, Secs. 243, 254. See also Yellowstone Valley Co. vs. Associated Mortgages Investors, 290 Pac. 255, (Mont.), 70 A. L. R. 1002. Adamson vs. Brockbank (Utah) 185 Pac. 2d 264. In this last case our court also refers to Sec. 78-1-11, U. C. A. 1943, which provides that a deed in statutory form includes appurtenances therewith, and then:

“If a deed by statute has the effect of passing all appurtenances to the property, then it is not varying the terms of a written instrument to establish what was appurtenant to the property. To hold to the contrary would render the quoted statute nugatory.”

The court then held in this, the Adamson vs. Brockbank case, that by reason of the implied easement that plaintiff should prevail, that the ditch is an appurtenance reasonably necessary to the use of the land for the purposes for which it was bought, in line with the visible objects (ditch) and the intended use of the land for farming purposes. By analogy, in the case at bar

certainly upon each transfer of the land by deed, the ditches were, undoubtedly, apparent, and hence the need for irrigation water also. Incidentally, following said Section 78-1-11, *George vs. Robinson*, supra, is quoted for the proposition that deed of general warranty of quiet and peaceable possession does not warrant water rights unless they are appurtenant to land conveyed.

At page 11 of brief appellant says that the deed from Sophia Andersen does not even mention a water right, that the reason it was not mentioned was because grantor and grantee "no doubt knew that the water right could not be transferred by deed", then cites Sec. 3478, Laws of Utah, 1917, which was then in force, and at page 14 of brief points out that these same laws were continued in force by Sec. 100-1-10, U. C. A. 1943, and Sec. 73-1-10, U.C.A. 1953, except for the part underlined following which was added:

"Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, *in which case water shall not be deemed to be appurtenant to the land.*"

This has been fully answered by what has been said about whether or not this constitutes a rebuttable or conclusive presumption and so will not be answered further.

Point No. 2: The court did not err and could not have erred in holding that the water covered by certificate of stock and the water used on the land is one and the same identical water, or used otherwise than

for the irrigation of said land described in the decree because there is not even a conflict in the evidence as to these matters; *and, that the water was never by any owner thereof either severed or intended to be severed from the lands.*

This point is intended to cover and answer appellant's point No. 2. All that part of the above, except that underlined, has been previously answered in this brief under point No. 1, so will not be further answered here. However, while appellant mentioned all of the above, in support thereof he only covers that part underlined, quotes the Deed to Water Rights, (Def's. Ex. 1) and then cites and quotes from East River Bottom Water Company vs. Boyce, et. al., 128 Pac. 2d 277, (Utah), (1942) and then attempts to bring the facts in the case at bar within that decision.

An analogy will show more points of difference than of similarity. Some of the main provisions of the Articles of Incorporation of Mendon Central Irrigation Co. were pointed out under Point No. 1 so will not be repeated here. The Articles certainly show that the purpose "is to engage exclusively in furnishing water to and for lands owned by the stockholders thereof (Art. 6), dividends shall consist of the distribution to the stockholders of such water as they shall be entitled to (Art. 8), costs of repairs of maintenance of ditches, etc., is to be assessed pro-rata against the different classes of stock (Art. 7-B), each party covenants with all other parties to the agreement that he

is the owner of a vested primary right to the use for irrigation purposes of a part of the waters arising and flowing from certain springs, which he agrees to convey as and for payment in full for the capital stock subscribed for by him (Art. 19), and the rights and privileges of the respective kinds and classes of stock and the holders thereof in this corporation, *are based upon the respective prior* vested rights of the stockholders, in and to the use of the waters arising and flowing from certain spring, and in accordance with such prior vested rights, each class of stock issued by the corporation entitles the holder to the following rights and privileges and none other, to-wit: the holder thereof shall have the right to the use of a stream of water arising from named springs in accordance with a schedule prepared from time to time by the directors. (Art. 7A)

But appellant says that because a deed was executed there was a severance of the appurtenant water rights to the corporation. First it must be again pointed out that Andrew Andersen's representation to the corporation when he signed the articles that he was the owner of a primary vested water right was not a fact because title to the lands were then vested in his wife and that therefore any stock issued to him must be deemed to belong to his wife and that he held the same as trustee for her in whom was vested the legal title to the lands. Counsel seems to place a good deal of

stress throughout the brief by repeating that there was a severance by reason of the execution of the instrument entitled "Deed of Water Rights." In this regard respondent desires to say it is immaterial whether a transfer to the corporation is made by the Deed of Water Rights or as was done in *East River Bottom Water Co. vs. Boyce*, supra, by "The signing of the articles of agreement and the payment of the amount required "shall constitute a transfer of all rights and privileges of the parties to the control, management and distribution of the water of the corporation, and will entitle the said parties to receive stock certificates for the amount of the interest in the corporation." The point is that whatever method was used served the purpose of making the required transfer to a mutual company. And the fact that Mrs. Andersen joined in the execution of the Deed of Water Rights cannot help appellant. He was not a grantee. But even so, assuming him to be the rightful owner of the stock, the Articles of Incorporation and the Deed of Water Rights must be read in the light of the provisions of said Sections 100-1-10 and 100-1-11 (now Secs. 73-1-10 and 73-1-11, U. C. A. 1953) and also in the light of the decision of our court in *East Bottom Water Co. vs. Boyce*, supra. And in this connection it must also be noted that counsel for appellant in arriving at the conclusion he does under Point No. 2 ignores entirely the provisions of said Section 100-1-11 and the decisions of our court following respecting appurtenant waters which is here-

by specifically referred to. So in construing the Deed of Water Rights and the Articles of Incorporation together in accordance with their agreement what did they accomplish? The first parties to the deed (except the wives) are the incorporators (and Andrew Andersen could not in fact be one because he did not own the lands and hence no primary vested water right as called for by the articles) and so as such conveyed to the corporation "all of the right, title and interest of the incorporators in and to certain spring and waters arising in and flowing from same as described in the the articles", etc., as and for full payment for the capital stock subscribed by them. And then it may be asked, for what purpose was the conveyance made? "To engage exclusively in furnishing water to and for lands owned by the stockholders thereof" (Art. 6) "based upon the respective prior vested rights of the stockholders" the stockholders "shall have the right to the use" etc.. "of a stream of water" from certain named springs according to schedule prepared by the Board of Directors. (Art. 7-A) The only dividends they were to receive was the distribution of the water they were entitled to under Art. 7-A. Is this then anything but the formation of a mutual company for any purpose other than the "control, management and distribution" of the waters of the springs? It severed nothing because the owners of the land still retains the use of the same water with their lands. "It did not vest the title or right of use in the corpor-

ation within the provisions of Revised Statutes of Utah, 1933, Secs. 100-1-10 and 100-1-11". The only thing the corporation could do was to "manage, control and distribute the water" according to a schedule prepared by the Board of Directors. The water right was therefore never severed from the land and is still appurtenant. And in the language used in *East River Bottom Water Co. vs. Boyce*, supra, at page 278, right hand column, would not "An examination of the articles of agreement to determine what a stock certificate represented, either for investment of loan purposes, disclose what the certificate actually represented." It, therefore, is submitted that even without consideration of the provisions of said Section 100-1-11, Water as Appurtenant, which counsel completely overlooks, the conveyance did not divest anything from the land.

Another matter, *East River Bottom Water Co. vs. Boyce*, supra, involved the question of a duplicate issue of seven shares stock which had been pledged to the State Bank of Provo as security for a loan and the plaintiff water company brought action to declare the duplicate issue void and the court did so upon the theory that the plaintiff was simply a mutual company, and not a corporation existing for profit.

In the case at bar the facts are vastly different. Here no third party or "outsider" has acquired any interest. Andrew must have intended or arranged for Quayle and Cowley to have conveyed the 17.63 acres

to his wife, otherwise he would not have later conveyed the 2.50 acre to her. It cannot be presumed he wanted her to have the land and not the water with it, without which it would be of little value. There is no evidence over all the years on the part of any one to sever the water from the land by sale, mortgage of the stock, or otherwise. The same water continued to be used on the same land as originally except that it was controlled and distributed by the irrigation company. That it was understood by all concerned that it was considered as part of the real estate is certainly most strongly indicated because the widow conveyed to her son L. M. Andersen, who continued to use these same waters on the same lands without question or interference for a period of over 23 years until his death. Then his estate was probated and assignments and conveyances were made by his heirs (who are the same as those of his father, Andrew Andersen, deceased) to Catherine Gibbons, who in turn conveyed to this plaintiff as hereinbefore stated. And that during all this period of time there was no attempt on the part of any heir to secure a probate of his estate, until some thirty years later when one of the heirs initiated probate proceedings, the only property listed being the 112 shares of water stock involved in this case. It would seem that such a record establishes appurtenancy of the water so clearly that it would not even be questioned. And appurtenancy is a question of fact. It is therefore submitted that appellant's Point No. 2 is not well taken in any view

whatsoever, either based upon the facts of usage of water over the years, or upon the Deed of Water Rights, the Articles of Incorporation, the Statutes referred to, or the decision in the East River Bottom Co. vs. Boyce, supra, upon which appellant relies.

Point No. 3: The court plainly did not err in finding and holding that the said water stock certificate never has been and is not now personal property separate and apart from said lands, or even so considered.

It is believed that this point has already been answered by what has been previously said under Points 1 and 2, and so the following will only answer the statements, etc., made by appellant under Point No. 3, which it is believed requires answering. First appellant makes the statement that it is conceded by plaintiff that the water right is represented by a certificate of stock in a corporaion. This statement may be admitted, but the admission carries with it only such rights and privileges as contended for in Point No. 2 above. Nor does respondent admit that Andrew Anderson at the time of his death, nor his estate, is the owner of the certificate. Appellant has the burden in this respect. The facts produced, respondent contends, dissipates any probative value of ownership which might arise from the signature appearing on the stub of the stock ledger. In fact, respondent does not admit Andrew Andersen ever was the real owner of the certificate even though issued in his name because at the time of signing the Articles of Incorporation he was not then the owner of a vested

primary water right as he then represented.

Counsel next contends that the finding of the lower court that the stock never has been and is not personal property separate and apart from said lands is made in the very teeth of Sec. 878, Compiled Laws of Utah 1917, (which is now 16-2-34, U. C. A. 1953) and quotes therefrom. A reference to this section shows that it is a part of Title 19, Chapter 1, General Incorporation. This section deals more particularly with shares of stock of pecuniary corporations. Following this section is cited the case of *George vs. Robinson*, *supra*, which has already been discussed, and in addition to what has already been said regarding this case it is submitted that the facts and reasoning in the case hardly supports the syllabus in its entirety and that it therefore does not hold what the syllabus would indicate. But even so, then section quoted at the top of page 18 says "stock shall be deemed personal property" and the delivery of certificate together with a written transfer of the same, signed by the owner to a bona fide purchase or pledge for value shall be deemed a sufficient transfer of title. Appellant cannot possibly benefit any by this provision because it has been complied with in no respect at all. Appellant cannot even produce the certificate.

Counsel next states that at time of judgment Sec. 18-2-23, 1943 (which is now 16-2-34 1953 was in full force, quotes the section and then asks, can there by any doubt

about the stock belonging to Andrew Andersen's estate and then says that for some unaccountable reason the lower court refused to apply this section to the settled facts of the case. This section is also part of the general incorporation law applicable to corporations organized for profit. See Chapter 2, Title 18, U. C. A., 1943. A glance at this section shows that it has no application to the facts in the case at bar. The section has two purposes: 1) For purposes of voting, receiving dividends, levying and collecting assessments, etc., *wherein the corporation is interested* the stockholder of record shall be treated and considered the holder in fact. There were no dividends paid except the distribution of water which over the years went with the record owners of the land; the record is silent as to who did the voting at any time, and the assessments were paid always by those who were the record owners of the land. The Mendon Central Irrigation Co. was therefore always satisfied. At least there is no record of any complaint by it. 2) The *transferee* shall have no rights or claims as against the corporation until transfer thereof is made upon the books of the corporation or a new certificate is issued to him. No claim has been made by any one against the corporation so far as the record discloses nor has a new certificate yet been issued, although the findings and decree (Tr. 11-13) finds and directs the said Mendon Irrigation Co. to issue another certificate to plaintiff in lieu of certificate No. 24, for the 112 shares of stock, under appropriate safeguards,

after which this plaintiff will then be the record owner of the certificate as well as the real owner thereof.

Counsel next cites, quotes from, and then argues that *George vs. Robinson*, *supra*, is controlling in the case at bar. Nothing can be added to what has already been said by respondent in regards to this case, and the fact that it has been overruled by *In re Johnson's estate*, *supra*, and so no further comment will be made. I do not notice where *First National Bank vs. Hastings*, 42 Pac. 681, (Col) is cited in *George vs. Robinson*, *supra*, but even if so it cannot have any weight since our court has decided the question otherwise. The issues were not at all alike. The question there was the rights of attaching creditors of the person in whose name the stock stood and a purchaser of the stock before issuance of new certificate. It is therefore submitted that the stock in question could not be personal property for any of the reason given under appellant's Point No. 3, and that the lower court was correct in its holding.

Point No. 4: The court was corerct in finding and holding that Mendon Central Irrigation Co. is a mutual company and that the interest in the water was conveyed with the land as an appurtenance.

Under this assignment appellant refers to and quotes from *East River Bottom Water Co. vs. Boyce* *supra*, and the *Deed of Water Rights*. Respondent considered both of the propositions mentioned under Point No. 1, where it seemed appropriate in view of

the matters there mentioned in appellant's brief, and so the discussion there made is referred to. At page 22 of brief appellant refers to the original stock certificate book (Def's. Ex. 3), calls attention to the new certificates issued to replace surrendered original ones, and then concludes that if the decision of the lower court is to stand then the water rights represented by the remaining 98 certificates issued is invalid as well as the certificates issued after Aug. 20, 1936, and that the certificates of every other incorporated irrigation company is also invalid. Respondent is unable to understand the basis for this deduction. Certainly, appellant would not take the position that the facts behind every outstanding certificate are the same as the facts in the case at bar. If so, then respondent agrees with appellant's conclusion. But by referring to the said stock ledger, nothing irregular is seen in issuing new certificates in lieu of old ones. When sales of lands were made the grantors no doubt in connection therewith endorsed and delivered the certificate, which was entirely proper. Or as appears from stub nos. 96, 97 and 99, the stock certificate was pledged to the Federal Land Bank of Berkeley and Utah Mortgage Loan Corporation, no doubt in connection with a mortgage of the land to which the water is appurtenant, and this also it would seem is proper procedure. Certainly no one would conclude that either of these corporations would purchase the stock as an investment. It is therefore believed that the conclusion reached

by appellant is unwarranted, in fact violent.

Point No. 5: The court was correct, in fact could not have done otherwise than to hold plaintiff to be the owner of certificate No. 24 and providing for the issuance of another one for the 112 shares of stock by the Mendon Central Irrigation Company.

Counsel for appellant states that such a finding constitutes an admission that the water right represented by certificate No. 24 is not appurtenant to plaintiff's property, but is distinct and separate property. Certainly there is sufficient in the findings to indicate otherwise. Respondent is unable to perceive the basis for any such deduction and shall therefore not pursue this statement any further. Counsel next at page 23 of brief cites and quotes again from *George vs. Robinson*, *supra*. This case has been discussed by respondent previously and so shall not duplicate what has already been said as to what this case holds and stands for. Counsel for respondent believes the only answer to be made to appellants' criticism of the quoted portion of the lower court's decree given at page 24 of brief is that the facts under the law justify and support the court's decree abundantly. It is impossible for appellant to see how an allegation in a complaint, followed by the court's finding, which described the property the subject of the law suit, and found by the court to be the property of the plaintiff, can be construed to mean that such property belongs to the estate of Andrew Andersen, deceased. Appellant has previously

discussed the facts and the chain of title referred to by appellant at page 25 of brief and so believes there is nothing further to be said in regards thereto. Counsel next conjectures that the heirs of Andrew Andersen did not ask for a probate because possession of the property was in his widow and children, although any one of them could have sought a probate at any time. Whatever, excuse might be assigned by counsel of appellant for the delay, respondent believes and the lower court seems to have believed and therefore found otherwise and such holding is supported both in the facts and certainly in equity.

Point No. 6: Finding No. 4 is properly included in the findings and is supported by equitable consideration.

At page 26 of brief counsel relates the sustaining of an objection, that counsel for respondent conceded that his offer was upon the theory that he believed the water right represented by the certificate of stock was appurtenant to the land, that the court apparently did not agree with this contention, but that nevertheless fourteen months later when the court rendered its decision paragraph four of plaintiff's complaint was included in the findings of the court. It is believed that there would be no useful purpose accomplished by attempting to argue this matter. It involves what a court does in "making up its mind" or "in rendering its decree". Suffice it to say, however, that the same objectionable matter which is complained about

appears in Pls. Ex. A, the abstract at pages 31-34, inclusive, to the admission of which no objection was raised. Furthermore, respondent submits that the Decree, following as it does the other conveyances and assignments made by the heirs of L. M. Andersen, Deceased, who are the same as the heirs of Andrew Andersen, Deceased, does have a bearing in equity in this case. It is believed that the remainder of the matters mentioned and discussed under appellant's Point No. 4 have heretofore been discussed and treated or do not require answer.

Point No. 7: The court's holding quieting title in the plaintiff, etc., is supported in equity, and is entitled to be sustained by this court.

By this point respondent intends to cover the matters not already treated in this brief and mentioned under appellant's Point No. 7: Counsels complains that there is no allegation or finding that plaintiff purchased this stock. Inferentially it appears that the water was paid for in connection with the various conveyances and assignments made, some of which even specifically included appurtenant water rights as hereinbefore stated. Rarely is a separate price put on water; it goes with the land. This is common knowledge. But the complete answer to such statement is that the decision of the court is supported by the facts proven, the statutes

referred to and the decisions of our court. No such findings that the stock as such was purchased is therefore necessary. Counsel next says the holding is contrary to *Snyder vs. Murdock*, 50 Pac. 9, (Utah) (1899) and *George vs. Robison*, supra. Both of these cases were overruled by the decision in *In re Johnson's estate* and so no useful purpose would be accomplished by discussing the *Snyder* case. Suffice it to say the facts are entirely different from those in the case at bar. Contrary to appellant's statement it is submitted that there is absolutely no testimony in the record to the effect that a majority of the heirs of the estate of Andrew Andersen, deceased, permitted certain of the other heirs to use the water. Nor is there a single scintilla of evidence that the use was premissive. It is believed that the balance of the statements made in the brief to the effect that the lower court's decision amounts to confiscation of property forbidden by the constitution, that title can only be acquired through a probate sale, that quiet title action can only be maintained by person having title, and that he must prevail on the strength of his own title and not on the strength of his adversary's, is so obviously inapplicable to the facts in this case as to require no answer.

Respondent having fully answered appellant's brief it is submitted that the lower court's Decree is supported both in law and the facts and entitled in equity

to be affirmed by this court, together with respondent's costs herein.

Respectfully submitted,
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Attorney for Plaintiff
and Respondent.